

IN THE  
**Supreme Court of the United States**  
October Term, 1975

DEC 29 1975  
MICHAEL RODAK, JR., CLERK

**No. 75-104**

UNITED JEWISH ORGANIZATIONS OF  
WILLIAMSBURGH, INC., *et al.*,

*Petitioners,*

*v.*

HUGH L. CAREY, *et al.*,

*Respondents.*

On Writ of Certiorari to the United States Court of  
Appeals for the Second Circuit

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**BRIEF OF  
AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION  
LEAGUE OF B'NAI B'RITH and JEWISH LABOR  
COMMITTEE, *AMICI CURIAE*, IN SUPPORT  
OF PETITIONERS**

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OF PETITIONERS**

Petitioners have challenged certain reapportionment laws adopted by the State of New York, in so far as they affect areas of Kings County, on the ground that the district boundaries were purposefully drawn on the basis of race, in violation of the 14th and 15th Amendments to the United States Constitution. Their complaint was dismissed and the decision was affirmed, 2 to 1, by the Court of Ap-

peals for the Second Circuit. A petition for writ of certiorari to review the judgment of the Court of Appeals was granted by this Court on November 11, 1975.

### **Interest of the Amici**

This brief is submitted on behalf of three national Jewish organizations, the American Jewish Congress, the Anti-Defamation League of B'nai B'rith and the Jewish Labor Committee. The American Jewish Congress was founded in 1908 and the Jewish Labor Committee in 1934. The B'nai B'rith was founded in 1843 and established the Anti-Defamation League as its educational arm in 1913.

All three of these organizations are concerned with the preservation of the security and constitutional rights of American Jews through the preservation of the rights of all Americans. Since their creation, they have opposed racial and religious discrimination in voting, employment, education, housing and public accommodations. Among their activities devoted to these ends, they have filed briefs as *amici* in this Court in cases where it was felt that the rights of any racial, religious or ethnic group have been threatened. These cases have included *Shelley v. Kraemer*, 344 U.S. 1 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Board of Education*, 374 U.S. 483 (1954); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); and *Lau v. Nichols*, 414 U.S. 563 (1974).

More specifically, in the area of voting rights, certain of the *amici* filed a friend of the Court brief in *Cardona v. Power*, 384 U.S. 672 (1966), urging the unconstitutionality

of the New York State literacy test on the grounds that it unlawfully disenfranchised American citizens of Puerto Rican origin.

We submit this brief because we believe that our system of constitutional liberties is impaired when the law gives sanction to the use of race in the decision-making processes of governmental agencies, except in certain circumstances where it is necessary to correct past purposeful discrimination.<sup>1</sup> We regard as unsound the basic postulates on which the 1974 New York reapportionment statutes rested. If those postulates and the resulting reapportionment are upheld, sanction will be given to racial proportional representation, racial and ethnic divisiveness will be intensified, and the process of popular elections on which our government rests will be seriously distorted.

Accordingly, *amici* have sought and obtained the consent of the parties to this case to the submission of this brief.

### **Statement**

Early in 1972, the State Legislature adopted Chapter 11 of the Laws of New York, 1972, reapportioning the legislative districts of the state on the basis of the 1970 census. Because a literacy test had been in effect until 1970 and

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1. It is the view of *amici* that, under the First Amendment, the limitations on governmental discrimination based on race are to a large extent applicable also to discrimination based on religion. We confine ourselves in this brief, however, to considerations of distinctions based on race. That is the only issue involved at this stage of the proceedings since petitioners do not question here the unanimous conclusion of the Court of Appeals that they lacked standing to sue as a religious group and that they had no right to relief as such a group (510 F.2d at 250-51).

because less than 50% of the voting age residents in Kings County and two other counties in New York State had voted in the presidential election of 1968, it had been determined that the trigger provisions of Section 4 of the Voting Rights Act (42 U.S.C. 1973b) applied to these areas.

In late 1971, the State of New York sought and obtained a consent judgment under Section 4(a) of the Voting Rights Act, exempting the three counties from the operations of the Act on the ground that in the preceding ten years the literacy test had not been used with a discriminatory purpose or effect. Before consenting to this judgment, the Department of Justice conducted a four-month investigation which included an examination of registration records of selected persons within the three counties, interviews with election and registration officials and interviews with persons familiar with registration activity in black and Puerto Rican neighborhoods in those counties. In addition, New York officials submitted affidavits indicating a less than 5 percent failure ratio among all applicants taking the literacy tests in the affected districts and attesting to registration drives conducted during the 1960's in predominantly black and Puerto Rican areas. Based on the Department's own investigation and the State submissions, David L. Norman, Assistant Attorney General in charge of the Civil Rights Division, concluded that there was no reason to believe that a literacy test had been used in the three counties with discriminatory purpose or effect. He noted, in an affidavit, filed April 3, 1972 (Affidavit of Assistant Attorney General Norman, filed April 3, 1972, in *New*

*York v. United States of America*, Civil Action No. 2419-71):

New York presently has suspended all requirements of literacy as a condition of registration and voting as required by the 1970 Amendments to the Voting Rights Act. Our investigation revealed no allegation by black citizens that the previously enforced literacy test was used to deny or abridge their right to register and vote by reason of race or color.

Accordingly, application of the Act to these counties was lifted on April 3, 1972. It was subsequently restored on the basis of a ruling in a 1973 proceeding that the State's failure to provide a Spanish translation of the ballots used in the 1973 election constituted illegal use of a literacy test in violation of the Act. *Torres v. Sachs*, 381 F. Supp. 309 (S.D.N.Y. 1973).

Section 5 of the Act (42 U.S.C. Section 1973c) requires approval by either the United States District Court for the District of Columbia or the United States Attorney General of any change in the laws affecting voting in a state or county held subject to Section 4 of the Act. Accordingly, Chapter 11 of New York's 1972 Laws, which routinely reapportioned the State Legislature on the basis of the 1970 Census, was submitted to the Attorney General for approval insofar as it applied to the three counties held to be covered by Section 4 of the Voting Rights Act.

On April 1, 1974, the United States Department of Justice, through Assistant Attorney General J. Stanley Pottinger, informed the New York Attorney General's office that the redistricting in Kings and New York Counties was

not acceptable because "we cannot conclude, as we must under the Voting Rights Act, that those portions of these redistricting plans will not have the effect of abridging the right to vote on account of race or color." The Attorney General noted that certain of the lines in these areas "appeared to have the effect of overly concentrating" minority populations in certain districts while "diffusing" the remaining minority population into a number of other districts.

Because of the imminence of the primary and general elections of 1974, the state did not exercise its right to challenge this ruling but proceeded to adopt new apportionment laws for those two counties. (Laws of New York (1974), Chapters 588-591 and 599). It is not questioned that these statutes were drafted to meet the objections expressed by the Department of Justice in the April 1 letter and that New York's legislative draftsmen understood that in order to meet these objections it was necessary to draw the lines in such a way as to assure that there would be three Senate and two Assembly districts in Kings County with non-white majorities of at least 65 per cent. New district lines, so drafted, were enacted and again submitted to the Attorney General. In a Memorandum of Decision dated July 1, 1974, they were given the approval required by statute.

These proceedings were initiated in the United States District Court for the Eastern District of New York on June 1, 1974. Petitioners (plaintiffs below), are organizations of voters residing in areas of Kings County affected by the new apportionment laws. They challenged the constitutionality of the 1974 laws, asserting their rights, both

as whites and as members of a discrete religious group, to legislative boundary lines drawn without conscious, deliberate effort to establish specific racial proportions in designated districts.

### **Question Presented**

Under the 14th and 15th Amendments, may apportionment laws be deliberately drawn to assure minority groups voting control in certain legislative districts, where there has been no affirmative finding that the prior apportionment was designed to reduce or suppress minority representation?

### **ARGUMENT**

**The use of racial quotas to determine legislative district boundaries is not justified by anything in this record and violates constitutional prohibitions of racial preferences in official decision-making.**

#### **A. The Basic Prohibition of the Use of Racial Factors**

All parties to this case, and both the majority and dissenting judges in the court below, agree that the challenged state legislative plan was "specifically drawn to ensure nonwhite voters a 'viable majority' . . . in state senatorial and assembly districts." 510 F.2d 512, 514. As more particularly described by the dissenting judge below: " \* \* \* [T]he Legislative Committee staff proceeded to redraw lines under a controlling mandate to see that seven Assembly and three Senate districts had nonwhite majorities of 65 percent or greater. The 65 percent figure was taken on

the explicit premise that anything less (given lower rates of voter registration and turnout) would render uncertain the power of the nonwhite majority to control election results in those districts."

Basic to our principles of representative democracy is the requirement that voting districts be established without regard to race or color. This principle is enshrined in the Fourteenth and Fifteenth Amendments and has often been stated by the Federal courts at all levels. See, e.g., *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973); *Fortsom v. Dorsey*, 379 U.S. 433 (1965); *White v. Regester*, 412 U.S. 755 (1973); *Whitcomb v. Chavis*, 403 U.S. 124 (1973); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Mann v. Davis*, 245 F. Supp. 241, 245 (E.D. Va.), aff'd 382 U.S. 42 (1965); *Kilgarlin v. Martin*, 252 F. Supp. 404, 437 (S.D. Tex. 1966), rev'd on other grounds, 386 U.S. 120 (1967); *Cousins v. City Council of Chicago*, 466 F.2d 830 (7th Cir. 1972), cert. denied, 409 U.S. 893 (1973).

The opprobrium rightly attaching to racial gerrymandering finds its counterpart in other aspects of our national life. The allocation of a "proportionate" share of available jobs, dwellings, school places or legislative districts to each racial, ethnic or religious segment in the community would fragment and divide our society by treating each group as a monolithic entity entitled, as such, to a prescribed share of each societal facility. Such allocation weakens the fabric of a community sufficiently battered by a wide variety of tensions and emphasizes group difference rather than communal cooperation.

Racial, ethnic or religious quotas, whether in employment, education or housing, offend against our traditional

notions of individual worth and dignity. "The replacement of individual rights and opportunities by a system of statistical classifications based on race is repugnant to the basic concepts of a democratic society." *Kirkland and Hayes v. The New York Department of Correctional Services*, 520 F.2d 420, 427 (2d Cir. 1975).

Employment of racial quotas in the electoral process is particularly fraught with dangers. As Justice Douglas so eloquently stated in his dissent in *Wright v. Rockefeller*, 376 U.S. 52, 67 (1964):

When racial or religious lines are drawn by the state, the multi-racial, multi-religious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan.

By drawing district lines on a racial basis, no less than by labeling a candidate by race on the ballot, the state indicates "that a candidate's race or color is an important —perhaps paramount—consideration in the citizen's choice." *Anderson v. Martin*, 375 U.S. 399, 402 (1965). In so doing, it reinforces prejudices, confirms perceived differences between the races and totally destroys the state's educative function on behalf of racial equality and neutrality in the political process.

Racial and ethnic quotas in redistricting, moreover, pose immense practical questions leading to absurd, often irreconcilable results. As Judge Frankel stated in his dissent below (510 F.2d at 533):

There are unbearable and absurd implications in the notion of "proportionality" between racial or ethnic

*population* percentages and percentages of *districts* controlled by different racial or ethnic groups. Beyond the limited skin-color divisions, some 65 percent white and 35 percent "nonwhite," Kings County has 10.7 percent Italian immigrants or people with at least one parent who immigrated from Italy, some unknown additional percentage of Italian ancestry, a similar figure of 5.9 percent plus unknown additional Russian, 35 percent Puerto Rican, 1.7 percent recently from Austria, 1.7 percent recently from Ireland (plus many more of Irish ancestry), 30.3 percent Jewish, 2.2 percent "other" religions, 1.3 percent recent German immigrants, plus a dizzying mass of others "whose lineage is so diverse as to defy ethnic labels." *DeFunis v. Odegaard*, 416 U.S. 312, 332 (1974) (Douglas, J. dissenting). How do we figure out the percentage of districts to be controlled by German Catholics, Russian Jews, black as against white Protestants, etc.? The short answer is, of course, that we don't. But the apparent "test" in today's majority opinion (31.4 percent nonwhite districts a "good" figure because less than the 35.1 percent nonwhite Kings County population) implies that perhaps we should.

One particularly anomalous result is the fate of the Puerto Rican minority in this case, the principal victims of the English-only ballot which served to trigger application of Section 5 of the Act. Although the Department of Justice in its July 1, 1974, ruling assumed that this group enjoyed the same rights under the Voting Rights Act as Negroes (pp. 10-11), it found no way to give them "proportionate" representation (pp. 14-16).

Judge Frankel's recital of the complications which would result from approval of the challenged New York Statutes and the underlying assumptions on which they

rest is no mere *reductio ad absurdum*. Under the newly enacted extension of the Voting Rights Act, the majority holding below would cause Judge Frankel's elucidation of the "unbearable" burden of attempting to assure electoral proportionality for racial and ethnic groups to become a reality.

The Voting Rights Act as extended now not only covers such non-Southern areas as parts of New York, California, Colorado and Alaska but protects non-English speaking minorities, including Alaskan natives, persons of Spanish heritage, Asian Americans and American Indians. Pub. L. No. 94-73 (July 24, 1975). The complexities of determining initially whether apportionment laws have the "effect" of abridging the rights now guaranteed by the Act to each of these groups and the further difficulties of devising "remedies" which allot particular groups effective voting control over a sufficient number of districts to assure their proportionate representation in the legislature, boggle the mind. Protecting each particular group, under the "standards" employed by the New York Legislature and approved by the court below, without at the same time trenching on the rights of other protected groups, or failing to respect historic boundaries and to assure compact and contiguous districts, would appear all but impossible.

#### **B. The Use of Race-Conscious Remedies Is Limited.**

For reasons of both principle and practicality, therefore, it is vital that any exception to the constitutional condemnation of racial quotas be narrowly confined. And the Courts have indeed confined the permissible use of racially conscious remedies to those instances in which it is deemed necessary to cure racial discrimination and where

no alternative, less invidious way to achieve this end is available. See, e.g., *Vulcan Society of the New York City Fire Department, Inc. v. Civil Service Commission*, 490 F. 2d 387 (2d Cir. 1973); *United States v. Wood, Wire & Metal Lathers Union, Local 46*, 471 F. 2d 408 (2d Cir. 1973).

Thus race-conscious remedies have been utilized by the lower courts to provide relief to victims of individual employment discrimination<sup>2</sup> and to change the racial composition of work forces whose racial makeup was the product of prior discrimination.<sup>3</sup> This Court has yet to decide upon the appropriateness of such relief. And, even in considering remedies to dismantle *de jure* segregated school systems, it has not endorsed use of a "fixed racial balance or quota."<sup>4</sup>

But the use of race conscious remedies to reverse the effects of prior discrimination, because it injects considerations that are customarily forbidden to official decision-making, must be carefully circumscribed. "[T]he task is

2. See, e.g., *Castro v. Beecher*, 459 F. 2d 725 (1st Cir. 1972).

3. *Carter v. Gallagher*, 452 F. 2d 315 (8th Cir. 1971), cert. den. 406 U.S. 950 (1972); *Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor*, 442 F. 2d 159 (3rd Cir. 1971), cert. den. 404 U.S. 854 (1971); see also *United States v. Ironworkers Local 86*, 443 F. 2d 544 (9th Cir. 1971), cert. den. 404 U.S. 984 (1971); *Castro v. Beecher*, 459 F. 2d 725 (1st Cir. 1972); *United States v. International Brotherhood of Electrical Workers Local 212*, 472 F. 2d 634 (6th Cir. 1973); *United States v. Wood, Wire & Metal Lathers Union, Local 46*, 471 F. 2d 408 (2d Cir. 1973); *Bridgeport Guardians, Inc. v. Commission*, 482 F. 2d 1333 (2d Cir. 1973). But see *Kirkland and Hayes v. The New York Department of Correctional Services*, 520 F. 2d 420 (2d Cir. 1975).

4. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971); *Winston-Salem/Forsyth County Board of Education v. Scott*, 404 U.S. 1221, 1227 (1971).

to correct, \* \* \* 'the condition that offends the Constitution.' " *Milliken v. Bradley*, 418 U.S. 717, 738 (1974). Such remedies have been upheld only after an express determination of prior discrimination. That determination, in turn, has rested upon a full and proper record, sufficient to support the finding of discrimination. The remedy has been causally related to the discrimination found to exist and carefully formulated by the tribunal responsible for imposing it.<sup>5</sup>

In the present case, none of these standards is met. As we shall show, a significant redistricting has admittedly been based upon a racial formula for which no one will assume responsibility, embodying a percentage proportion which remains unarticulated, undefended and unsupported in any official determination, unaccompanied by any finding of racial discrimination in prior redistricting, and triggered by an electoral "device"—the failure to print bilingual ballots—which has no causal relationship whatever of any kind to the conditions which the 1974 statute was supposed to correct. To permit legislative district lines to be set on the basis of racial proportions in such circumstances is to sanction a dangerous, ill-advised incursion into the principle of race-free decision-making in general and race-free redistricting in particular.<sup>6</sup>

5. See cases cited *supra*, footnotes 2, 3, and 4.

6. The suggestion that petitioners lack standing to complain because whites are in the majority in a number of districts proportionate to the white population of Kings County as a whole and because white legislative representation from the County more than matches the white proportion in the entire County should be rejected out of hand. Whites in the gerrymandered districts are entitled to race-free districting determinations. The fact that other whites in other

(footnote continued on next page)

**C. The Challenged Redistricting Rests Upon a 65% Racial Proportion Which No Responsible Official Determined to Be Appropriate or Required.**

Although all parties agree that the redistricting was accomplished by consciously establishing certain districts with a 65% nonwhite population, the 65% formula resembles an illegitimate child whose percentage no one will acknowledge. The state authorities gained the impression that only a minimum 65% nonwhite district would satisfy the United States Attorney General and they proceeded accordingly. The Attorney General disclaims responsibility for this formula and asserts only that the 1972 redistricting failed, in his opinion, to satisfy the Act. Intervenors seek to defend the rationality of the 65% formula but fail to point to any official determination by any responsible official adopting, explaining or justifying it.

The constitutional imperative of color blind decision making cannot be so casually overridden. Even if a limited exception is to be recognized for racial preferences required

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portions of the County may not be similarly prejudiced (or may, indeed, be advantaged by the racially conscious concentration of nonwhites in certain districts) does not detract from the Constitutional deprivation visited upon petitioners or their standing to complain. Theirs are individual and personal rights which have been invaded and the deprivation does not depend on the electoral strength of their racial group as a whole. *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948); see *Reynolds v. Sims*, 377 U.S. 533, 561 (1964). In fact, the very use of a standard which determines injury, in this context, by evaluating whether there is proportionality between the percentage of districts controlled by different racial or ethnic groups and these groups' percentage in the population is constitutionally impermissible. It necessarily imparts into the districting process concepts of racial proportional representation alien and abhorrent to our electoral system.

to overcome past racial discrimination, at the very least the official determinations embodying that exception must clearly and precisely express both the facts justifying such relief and the precise remedy called for. On this record, the necessary underpinning for the racial quotas embodied in the enactment under challenge is wholly lacking.

**D. There Was No Affirmative Finding that the 1972 Apportionment Was Designed to Reduce or Suppress Minority Representation.**

The majority below argued that the state's prior use of the literacy test and untranslated English ballot coupled with the 1972 redistricting constituted "invidious discrimination in favor of white voters and against nonwhites \* \* \*" and thus justified the 1974 racial gerrymander. (510 F.2d 525).

As we shall show below, the mere existence of trigger factors unrelated to redistricting—here an English-only ballot and low levels of minority voting—do not warrant the extraordinary remedy of drawing district lines to assure to certain races voting control of particular legislative districts. Nor, contrary to the implications in the majority opinion below, did the Attorney General affirmatively find such "invidious discrimination" in the drawing of the 1972 lines as to give constitutional sanction to such a remedy. The Attorney General stated:

First, with respect to the Kings County congressional redistricting, the lines defining district 12 and surrounding districts *appear* to have the effect of overly concentrating black neighborhoods into district 12, while simultaneously fragmenting adjoining black

and Puerto Rican concentrations into the surrounding majority white districts. We have not been presented with any compelling justification for such configuration and our own analysis reveals none. Moreover, it appears that other rational and compact alternative districting could achieve population equality without such an effect. (Emphasis added.)

Senate district 18 *appears* to have an abnormally high minority concentration while adjoining minority neighborhoods are significantly diffused into surrounding districts. In the less populous proposed assembly districts, the minority population *appears* to be concentrated into districts 53, 54, 55 and 56, while minority neighborhoods adjoining those districts are diffused into a number of other districts. (Emphasis added.)

He concluded:

\* \* \* on the basis of all the available demographic facts and comments received \* \* \* as well as the state's legal burden of proving that the submitted plans have neither the purpose nor the effect of abridging the right to vote because of race or color, we have concluded that the proscribed effect *may* exist in parts of the plans in Kings and New York County. (Emphasis added.)

We recognize, of course, that the process of legislative apportionment can be used to disfranchise voters and that it has been so used against non-whites. It is for that reason that this Court held, in *Allen v. State Board of Elections*, 393 U.S. 544 (1969), that apportionment measures were included among those that must receive review under Section 5 where the trigger provisions of Section 4 are operative.

But the Attorney General's decision does not rise to an affirmative finding that the 1972 apportionment, in so far as it affected Kings County, was employed for that purpose or had that effect. It does not provide an adequate substantive or procedural foundation for a reversal of the long-standing judicial policy that race should not be a determinant in drawing district lines.

As a substantive matter, the Attorney General's analysis hardly presents a convincing case of discriminatory abridgement of minority political strength. Minority voters, like political scientists, are not of one mind as to whether minority political strength is maximized by creating strong political blocs in a large number of districts or concentrating the overwhelming number of votes in a few "safe" minority districts. In *Wright v. Rockefeller*, 376 U.S. 52 (1964), minority voters challenged a district plan allegedly drawn on racial lines and designed to concentrate Blacks in safe Negro districts. The Court rejected the challenge for failure of proof but noted in passing that "some of these voters \* \* \* would prefer a more even distribution of minority groups among the four congressional districts, but others, like the intervenors in this case, would argue strenuously that the kind of districts for which appellants contended would be undesirable \* \* \*." 376 U.S. at 57-58.

But even if the Attorney General's 1972 opinion were based on appropriate standards of possible abridgement, his negatively couched, ambivalent ruling cannot provide an adequate constitutional foundation for a racial gerrymander.

All that the Attorney General was required to find under the Voting Rights Act, in order to disapprove the change submitted to him, and the most that can be read into his actual findings, was that the State of New York had not sustained its legal burden of proving that the 1972 plan would not have the effect of abridging the right to vote on grounds of race and color.<sup>7</sup> In actuality, however, ambivalence faded into ambiguity, for the Attorney General did not even find that this "would" be its effect, only that it "may." The Attorney General's ambivalent and negatively couched finding with respect to the 1972 New York redistricting statute may well have been consonant with his obligation under the Voting Rights Act. It cannot, however, form a factual predicate or justification for a redistricting law embodying a blatant, purposeful racial classification.

In cases alleging infringement of the 14th and 15th Amendments arising out of a racial gerrymander, the burden of proof is on the challenging party to affirmatively establish the presence of discrimination. See, e.g., *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *White v. Regester*, 412 U.S. 755 (1973); *Cousins v. City Council of City of Chicago*, 503 F.2d 912 (7th Cir. 1974). This no doubt reflects the Court's reluctance to invade the political process of redistricting in the absence of clear proof of discrimination against racial or ethnic minorities. Section 5 of the Voting Rights Act, however, was enacted to provide a time-

7. Three judges of this Court have already expressed the view that even in such circumstances the Attorney General, in passing on the acceptability of voting changes under Section 5, should be required to invoke its provisions only when he is able to make an affirmative finding of discrimination rather than an ambivalent one. See the dissents of Justice Powell, Rehnquist and White in *Georgia v. United States*, 411 U.S. 526, 545 (1973).

saving administrative device to prevent the state legislatures from creating new discriminatory mechanisms to nullify hard won litigation victories against voting discrimination. The shifting of the burden "has resulted in objections to many changes that could not have been judicially enjoined because the burden of proving discrimination could not be met." Derfner, *Discrimination and the Right to Vote*, 26 Vanderbilt L. Rev., 523, 581 (1973).

It would be ironic if a finding, based on a standard of proof which was devised merely to obtain a speedy determination of the limited question of whether a state must go back to the drawing board in the drafting of voting legislation, should be used as the factual basis for giving judicial sanction to state enactments which purposefully classify voters by race. It would be a gross distortion of constitutional standards to permit a procedure such as this, implemented by a determination such as the Attorney General issued in this case, to breach the barrier to legislative redistricting by racial quota.

**E. There Is No Relationship Between the "Remedy" and the Violation Which Triggered Operation of Section 5 of the Act.**

The rationale permitting considerations of race to enter into remedies designed to correct past discrimination requires that the correction be intimately related to the particular violation and the harm it created. "[T]he nature of the violation determines the scope of the remedy." *Milliken v. Bradley*, 418 U.S. 717, 738 (1974); *City of Richmond v. United States*, 95 S.Ct. 2296 (June 24, 1975). Here no such relationship exists; the "foul" under the Voting Rights Act which triggered the operation of Section 5

relied on by the Court of Appeals majority had nothing to do with the type of legislative apportionment adopted for Kings County in 1974 (510 F.2d at 517). Kings County became subject to the approval requirements of Section 5 of the Voting Rights Act because (a) a literacy test had been in effect on November 1968; (b) it had been found that less than 50% of the persons of voting age were registered or had voted in November 1968; and (c) although that literacy test was no longer in effect and New York State had been viewed as being in full compliance with the statute, a United States District Court had ruled that New York had violated the Voting Rights Act because it conducted an election with ballots in English only, a circumstance which did not affect voting by Blacks or representation of Blacks.

The state legislative policy that shaped the 1974 statute—compelled, the draftsmen believed by the Attorney-General's guideline—was that the Black and Puerto Rican minority viewed as a unitary bloc must have a substantial majority in a specified number of legislative districts. This consideration is totally unrelated to the evil that had caused the Voting Rights Act to be invoked—the disenfranchisement of non-English speaking voters through use of English-only ballots.

The victims of this practice were the Spanish-speaking minority *alone*, not the Blacks. Even assuming it were constitutionally appropriate to correct the failure to print ballots in Spanish by so incongruent a device as redrawing district lines, the 1974 lines did not assure or even create the potential of increased specific representation of the

Puerto Rican group. (See the Department's Memorandum of Decision, July 1, 1974, pp. 14-16.)

As the dissent below points out (510 F. 2d 512, 529 n. 4), the Puerto Rican group viewed their electoral goals and interests as different from those of Black voters. They “resisted being submerged by Black minorities or pluralities to make nonwhite majorities” and sought separate representation. Thus the “remedy” of drawing district lines to give an artificially created “nonwhite” bloc working control of certain districts was no remedy at all. It had no relationship to the injury suffered by the Puerto Ricans as a result of the untranslated ballot. It did, however, give an unjustified preference, in certain newly-created districts, to Black voters who had been neither injured by a literacy test nor harmed by the English-only ballot.

The redrawing of district lines to give working control to minorities does not effect a cure of the evil caused by a literacy test or ballot infringement. That cure is effected by the elimination of the improper test and the printing of the ballot in the appropriate language. At that point the disadvantage to the minority voter is remedied and he can then go to the polls at the next election and achieve the representation due him in the newly-elected legislature.

In order to assure that the remedy is not nullified by further subterfuge, the Voting Rights Act requires that any changes in voting qualifications or procedures, including redistricting, must be approved by the Attorney General or the United States District Court of the District of Columbia. Nowhere, however, does that Act and its recent

hotly debated extension, require or even authorize, as a remedy for any past possible underrepresentation which may have resulted from literacy tests or English-only ballots, the drawing of district lines to guarantee working control in particular districts to the minorities who might have been affected by these devices. It is doubtful, to say the least, that such a legislative mandate—and there is none—could pass Constitutional muster.

### Conclusion

**For the foregoing reasons, we respectfully urge that the judgment of the Court of Appeals be reversed and New York's 1974 reapportionment declared unconstitutional under the Fourteenth and Fifteenth Amendments.**

Respectfully submitted,

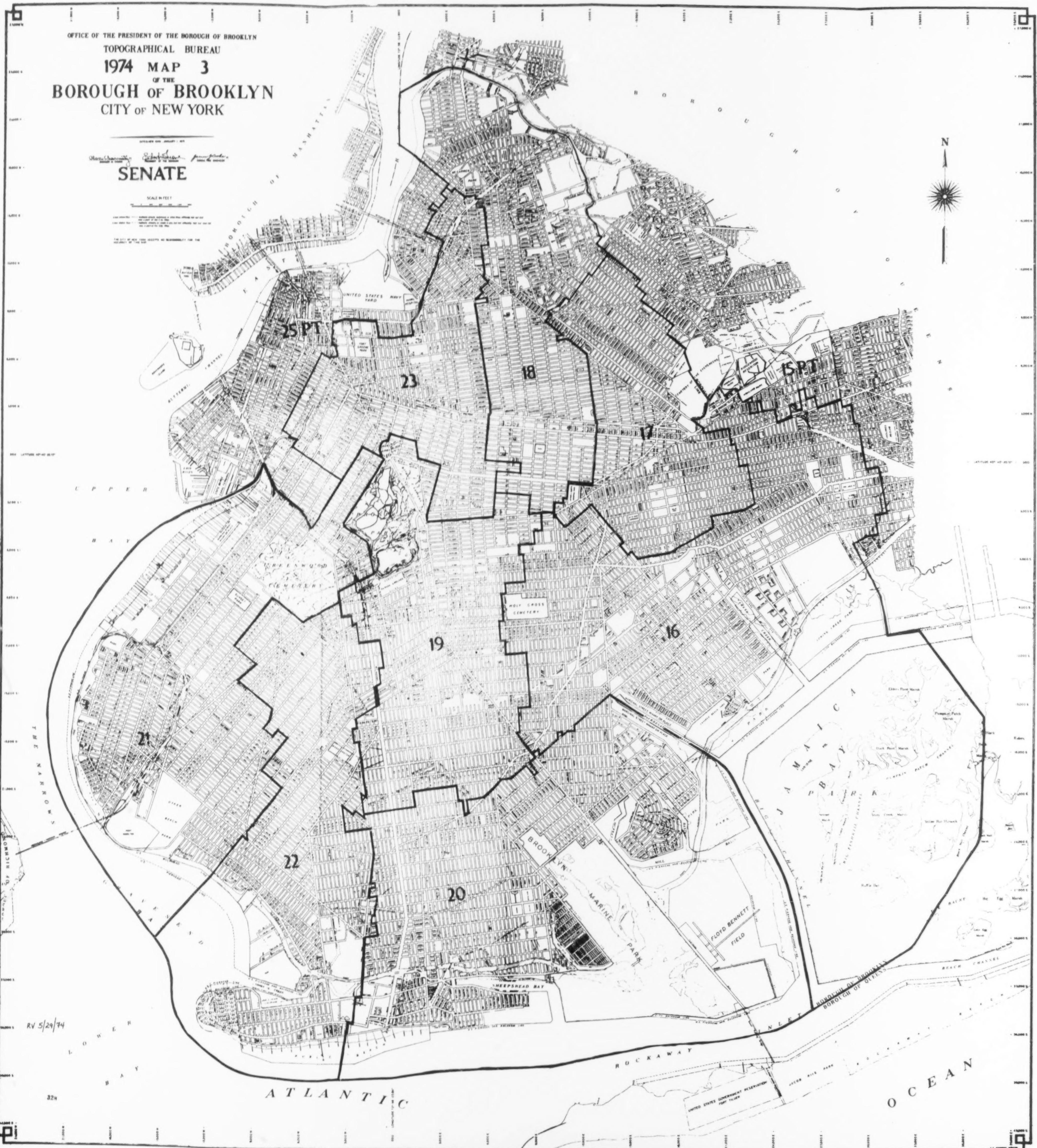
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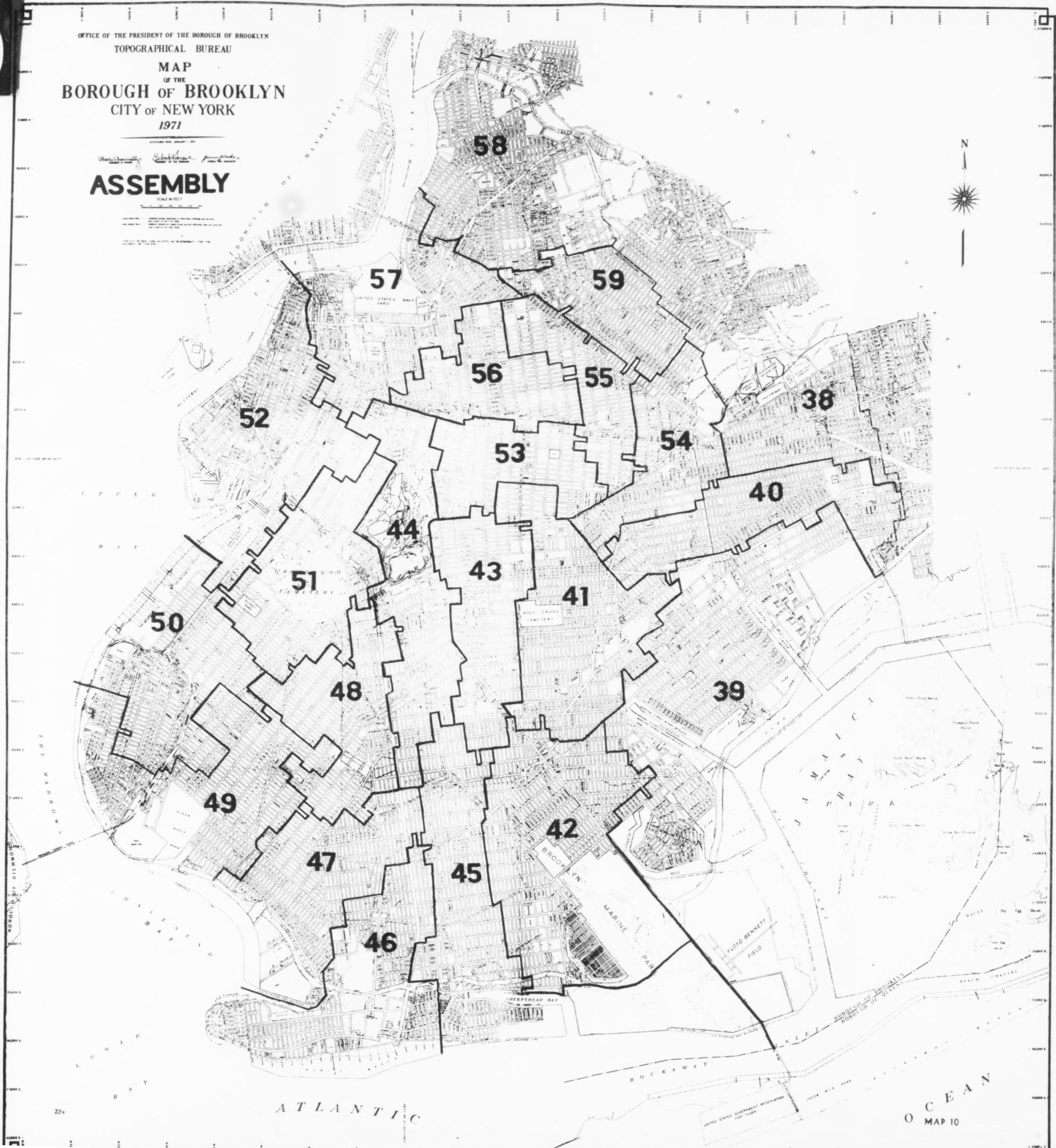
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